2005

Gardner v. Board of County Commissioners of Wasatch County : Brief of Appellee

Utah Court of Appeals

Craig V. Wentz; Barton H. Kunz II; Christensen & Jensen, PC; Counsel for Defendants.
Gordon Duval; Brian K. Haws; Duval Haws & Moody PC; Counsel for Appellants.

IN THE UTAH SUPREME COURT

JOHN and OLGA GARDNER; ROBERT and MICHELLE PEREZ; HOWARD and HELEN VANFLEET; VICTOR and LINDA ORVIS; HUGH and CAROLYN ALLRED; HELEN VAN ORMAN; BLAKE and NANCY RONEY; ALDO and VALERIE BUSSIO; DEE and WILMADEAN OLSEN; STEVE and BRIDGET HIRSCHFIELD; and JOHN DOES 1-72,

Plaintiffs/Appellants;

vs.

BOARD OF COUNTY COMMISSIONERS OF WASATCH COUNTY, a legislative body; WASATCH COUNTY, a political subdivision; BOB MATHIS, Wasatch County Planner and individually; PHIL WRIGHT, as Wasatch County Health Director and individually; RALPH DUKE, as Wasatch County Commissioner and individually; MICHAEL KOHLER, as Wasatch County Commissioner and individually; LAREN PROVOST, as Wasatch County Commissioner and individually; KEITH JACOBSON, as a former Wasatch County Commissioner and individually; SHARRON WINTERTON, as a former Wasatch County Commissioner and individually;

Appellate Case No.: 20051110-SC

Defendants/Appellees.	

APPEAL FROM THE FOLLOWING ORDERS IN THE FOURTH DISTRICT COURT:

1. A SEPTEMBER 25, 2001, SUMMARY JUDGMENT ORDER GRANTED BY THE HONORABLE JAMES R. TAYLOR;

2. AN APRIL 8, 2002, SUMMARY JUDGMENT ORDER GRANTED BY THE HONORABLE JAMES R. TAYLOR;

3. A FEBRUARY 7, 2005, ORDER TO COMPEL GRANTED BY THE HONORABLE ANTHONY W. SCHOFIELD;

4. A MAY 31, 2005, ORDER LIMITING SUIT TO NAMED PLAINTIFFS GRANTED BY THE HONORABLE ANTHONY W. SCHOFIELD;

5. AN OCTOBER 24, 2005, SUMMARY JUDGMENT ORDER GRANTED BY THE HONORABLE ANTHONY W. SCHOFIELD; AND

6. A NOVEMBER 21, 2005, ORDER AWARDING FEES AND EXPENSES GRANTED BY THE HONORABLE ANTHONY W. SCHOFIELD

BRIEF OF THE APPELLEES

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PARTIES TO THE PROCEEDING

Plaintiffs/appellants ("Landowners") list an additional twenty-nine names as plaintiffs in this proceeding, apparently identifying them as the "John Does" mentioned in the caption. (Aplts.' Br. at i.) Since the district court refused to allow the Landowners to add these and other individuals as plaintiffs, and its decision on that point serves as a basis for this appeal (Aplts.' Br. at 59-61), the Court should not consider them parties to the proceeding.

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TABLE OF AUTHORITIES

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STATEMENT OF JURISDICTION

Utah Code Annotated § 78-2-2(3)(j) confers jurisdiction on this Court to hear this appeal. The Court determined to retain its jurisdiction rather than transfer the case in an order dated January 3, 2006.

STATEMENT OF THE ISSUES

The Landowners' citations to the record (or records)[1] do not correlate with the issues they identify as I, IIIA, IIIC, VI, and IX. Their citations for issue XI correspond to the allegations of their proposed Second Amended Complaint, which was never allowed. (Indeed, the Landowners' conceded that their request to have summary judgment entered against them rendered their motion to amend moot. (Aplees.' Add. at 28.)) Nevertheless, defendants/appellees (the "County") attempt to address these issues in this brief. The County attempts to clarify the issues on appeal as follows:

Issue No. 1: Whether the district court properly held that the Landowners' challenge to Wasatch County Ordinance (WCO) 97-1, a temporary zoning regulation enacted under Utah Code Annotated § 17-27-404 (1992), was untimely; or, if timely, whether the regulation was procedurally valid under state law. (Aplts.' Add. at 10, 42, 46; Aplees.' Add. at 2, 6, 12-13[2].) (Landowners' Issue IIIC.)

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[1] The "record" in this case actually consists of three distinct and independently numbered records. The first is from case number 970400335 ("R335."). The second, from case numbers 990500330 and 990403554 ("R554."). The last, and most developed, is composed of filings from case numbers 970400227 and 990401676 ("R676."). The Landowners make no differentiation in their record citations.

[2] While the Landowners include two memorandum decisions issued by the court below in

Standard of Review: Correctness. *See, e.g., Ellsworth v. American Arbitration Assoc.*, 2006 UT 77, ¶12 (holding that a summary judgment only presents questions of law, which are reviewed for correctness).

Issue No. 2: Whether, upon review, the district court properly held that WCO 97-1 and 97-13, temporary zoning regulations enacted under Utah Code Annotated § 17-27-404 (1992 & 1997), were not arbitrary, capricious, or illegal. (Aplts.' Add. at 42-46, 51-52; Aplees.' Add. at 2-3, 7.) (Includes Landowners' Issues III, IIIB, and IIID.)

Standard of Review: Correctness. *See supra*, Issue No. 1. However, the regulations themselves are presumed valid, *see* Utah Code Ann. § 17-27-1001 (1996), and the Court employs the reasonably debatable variation of the arbitrary and capricious standard when conducting its review, *see Bradley v. Payson City Corp.*, 2003 UT 16, ¶¶14 & 24, 70 P.3d 47.

Issue No. 3: Whether the district court correctly held that WCO 97-1 and 97-13 did not effect regulatory or physical takings of the Landowners' property in violation of the Fifth Amendment. (Aplts.' Add. at 4-9, 47-48; Aplees.' Add. at 3-4, 12-13.) (Includes Landowners' Issues I, II, VI, VII, VIII, and IX.)

Standard of Review: Correctness. *See supra*, Issue No. 1.

Issue No. 4: Whether the district court appropriately held that the County's enactment of WCO 97-1 and 97-13 did not violate the Landowners' federal substantive due process or equal protection rights. (Aplts.' Add. at 49-50; Aplees.' Add. at 5-6.) (Landowners'

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their addendum, they omit the orders from which they appeal. The County includes those orders in its addendum.

Issue X.)

Standard of Review: Correctness. *See supra*, Issue No. 1.

Issue No. 5: Whether the district court correctly held that Wasatch County Resolution (WCR) 99-11, which prohibits members of the county government's control group from discussing pending litigation with litigants adverse to the County unless expressly permitted by the county attorney's office, did not infringe on the Landowners' First Amendment rights. (Aplts.' Add. at 53-54; Aplees.' Add. at 8.) (Landowners' Issue V.)

Standard of Review: Correctness. *See supra*, Issue No. 1.

Issue No. 6: Whether the district court properly held that the Landowners' challenge to defendant Wright's alleged enforcement of percolation tests at a depth of four-feet and ten-inches as a violation of their federal constitutional rights was barred by *res judicata*. (Aplts.' Add. at 11-12; Aplees.' Add. at 15.) (Landowners' Issue IV.)

Standard of Review: Correctness. *See supra*, Issue No. 1.

Issue No. 7: Whether the district court abused its discretion by granting the County's motion to compel the Landowners' answers to interrogatories requesting they identify the bases for their claims. (Aplees.' Add. at 17-19.) (Landowners' Issue XIII.)

Standard of Review: Abuse of discretion. *See Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 2006 UT App 48, ¶3, 129 P.3d 287 ("We review the grant or denial of a motion to compel discovery under an abuse of discretion standard.").

Issue No. 8: Whether the district court abused its discretion when it granted the County's motion to limit the plaintiffs in the suit to those named in the Landowners' Amended Complaint. (Aplees.' Add. at 20-21.) (Landowners' Issue XIV.)

Standard of Review: Abuse of discretion. The County interprets this motion as akin to one to amend or deny an amendment of a complaint, and therefore subject to an abuse of discretion standard of review. *See Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994) ("We will not disturb a trial court's ruling on a motion to amend a complaint absent a clear abuse of discretion.").

Issue No. 9: Whether the Landowners' request for the district court to enter summary judgment against them waived their claims of zoning estoppel, that WCO 97-13 lasted longer than six months, and for alleged violations of their federal constitutional rights committed by defendants Wright and Mathis. (Aplees.' Add. at 15, 36-37.) (Includes Landowners' Issues IIIA, XI, and XII.)

Standard of Review: Correctness. *See supra*, Issue No. 1.

Issue No. 10: Whether the district court abused its discretion when it awarded the County, pursuant to 42 U.S.C. § 1988, its attorney fees and costs incurred in defending against claims ultimately abandoned by the Landowners as unwinnable. (Aplees.' Add. at 38-40.) (Landowners' Issue XV.)

Standard of Review: Abuse of discretion. *See Sinajini v. Board of Educ.*, 233 F.3d 1236, 1239 (10th Cir. 2000) ("'[W]e review an attorney's fee award under 42 U.S.C. § 1988(b) for an abuse of discretion.'" (quoting *Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998)).

CONTROLLING CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

1. Utah Code Annotated § 17-27-404 (1997), included in Appellees' Addendum. (Aplees.' Add. at 93-94.)

STATEMENT OF THE CASE

Nature of the Case

The Canyon Meadows development is located on the north side of the upper portion of Provo Canyon in an area mapped as the Hoover Slide. Between 1981 and 1984, subdivision plats were approved for eighty-four lots. Several of those lots had been improved when, in January, 1997, Wasatch County enacted a six-month temporary zoning regulation pursuant to Utah Code Annotated § 17-27-404 (1992): WCO 97-1. The ordinance was adopted in response to warnings of potential slope instability and unsuitable septic system conditions in Canyon Meadows that could pose significant risks to public health and safety from the Utah Department of Transportation (UDOT), the Utah Geological Survey (UGS), the Wasatch City-County Health Department and its consulting geotechnical engineers, and even the Landowners, who opposed a contiguous development. The ordinance prohibited the acceptance or approval of applications for building permits requiring septic systems, and mandated studies of slope stability and septic system suitability in Canyon Meadows. After WCO 97-1 expired, the county adopted a new interim zoning regulation, WCO 97-13, imposing new restraints on development in Canyon Meadows subject to the notable exception that building permits could be issued if individual lot owners could establish that their lots were sufficiently stable. The

Landowners filed several suits challenging the validity of the ordinances, and claiming they violated their federal constitutional rights, particularly that they constituted an uncompensated taking. Both ordinances have expired.

The Course of Proceedings and Disposition Below

This case's long and labyrinthine history began almost a decade ago, with a case filed in Wasatch County by most of the Landowners. When the case was transferred to Utah County, it was given the case number from which this appeal is taken. (R676. at 104-07.) Some of the Landowners filed a second suit in Wasatch County at around the same time. A little over two years later, that suit was consolidated with another that had been filed in Wasatch County. (R.335 at 80-81.) After consolidation, the resulting case was also consolidated into this case, which by then had been renumbered and transferred to Utah County. (R.554 at 1355-56; R.676 at 143.) Prior to the final consolidation, the County made an offer of judgment in the amount of $125,000, including attorney fees, which the Landowners rejected. (R676. at 3843-45.)

After wending through these procedural convolutions, the parties filed cross-motions for summary judgment. Upon hearing argument, Judge James R. Taylor issued a memorandum decision dismissing all the Landowners' claims, save four issues: (1) whether defendants Mathis and Wright enjoyed qualified immunity from the Landowners' federal substantive due process and equal protection claims; (2) if not, whether punitive damages should be awarded against them; (3) whether the county was estopped from refusing to issue building permits based on representations allegedly made by defendants Mathis and Wright; and (4) whether WCO 97-13 lasted longer than six months. (Aplts.'

Add. at 41-54; Aplees.' Add. At 1-10.)

The parties shortly thereafter filed cross-motions for reconsideration, and, upon hearing argument, Judge Taylor narrowed the scope of the remaining claims against defendants Mathis and Wright. The district court limited the claim against Mathis to whether he violated the Landowners' constitutional rights by allegedly enforcing the moratoria longer than six months. The remaining claim against Wright questioned whether his alleged requirement that the Landowners conduct percolation tests of "a certain age and quality" violated their constitutional rights. (Aplts.' Add. at 3-12; Aplees.' Add. at 11-16.)

The Landowners then unsuccessfully petitioned to file an interlocutory appeal. (R676. at 2447-49 (Appellate Case No. 20010813-SC).) Upon denial, the parties unsuccessfully attempted to mediate the case and engaged in discovery. The County had propounded several contention interrogatories to the Landowners, who objected thereto, and the County filed a motion to compel. After hearing argument, Judge Anthony W. Schofield (to whom the case had rotated) ordered the Landowners to answer the interrogatories and awarded the County fees incurred in pursuing the motion. Judge Schofield also required the Landowners to file verifications endorsing their answers. (Aplees.' Add. at 17-19.) Upon receiving verifications from individuals not identified as parties to this suit, the County moved to limit the plaintiffs to parties named in the suit. The district court granted the County's motion, limiting the plaintiffs to those named in

their Amended Complaint.[3] (Aplees.' Add. at 20-21.)

The County thereafter moved for summary judgment on the Landowners' remaining claims. After briefing was completed, including on collateral motions to strike and the Landowners' motion to amend their Amended Complaint, the parties appeared for a hearing on the pending motions before Judge Schofield. To the County's surprise, the Landowners' counsel requested the court enter summary judgment against the Landowners on their remaining claims. (Aplees.' Add. at 25.) The County agreed, and the district court obliged. (Aplees.' Add. At 36-37.) The County then moved for an award of the attorney's fees and costs it had incurred defending against those remaining claims under 42 U.S.C. § 1988. The district court granted the County's motion, and awarded it $74,319.71. (Aplees.' Add. at 38-40.)

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

The Canyon Meadows Subdivision

1. Canyon Meadows was approved as a mountain subdivision located in the Provo Canyon area of Wasatch County about thirty-five years ago. (R676. at 340, 435, 1636, 2075.)

2. The county originally approved the subdivision based on a plan for individual septic tanks for wastewater treatment. (R676. at 340, 435, 1636, 2075.)

3. By the time the parties filed their cross-motions for summary judgment,

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[3] The order also required them to certify their answers to interrogatories or face dismissal. Because they failed to provide the required certifications, plaintiffs Helen Vanfleet, Aldo Bussio, and Steve and Bridget Hirschfield were dismissed from the suit with prejudice. (R676. at 3196-97.)

eighty-four lots had been platted and recorded in the development in two plats, Plats A and B, and two designated condominium areas. (R676. at 435, 1636, 2075.)

4. A majority of the Canyon Meadows lots sit on the historic Hoover Slide. (R676. at 238, 434, 1636, 2075.)

Concerns about Slope Stability and Septic Feasibility

(a) UDOT Warnings

5. Sometime prior to May, 1994, another development, New Canyon Meadows, proposed a large residential project on land contiguous to Canyon Meadows. (R676. at 238, 434, 1636, 2075.)

6. On May 10, 1994, Randall R. Park, P.E., Project Manager for UDOT, considering the proposed development, informed defendant/appellee Robert Mathis, the Wasatch County Planner, that "[t]here is substantial movement in the [Hoover S]lide, and the depth of movement is such that it is not likely that the slide can be stabilized." Park also expressed concern regarding increasing the number of septic systems in the area, noting that "[t]his may pose a serious impact to the Hoover Slide, ..." Park's conclusions were based on UDOT's recent drilling of twenty-six observation wells and installation of inclinometers to monitor the movement of the Hoover Slide. (R676. at 165-66, 169, 434, 1634-36, 2075.)

7. Park's observations led Mathis to conclude that there existed legitimate evidence of slope instability in the Canyon Meadows area. (R676. at 179-80, 434, 1632-34, 2075.)

8. The Landowners also shared UDOT's concern that the new development may have posed a serious impact on the Hoover Slide, and agreed that recommendations to

monitor slope stability made in a geotechnical report by Parson Brinkerhoff were reasonable because the UDOT road below Canyon Meadows could affect slope stability both in the New Canyon Meadows proposal and in Plats A and B of Canyon Meadows. (R676. 236, 238, 433-34, 1631-32, 2075.)

(b) UGS Warnings

9. By letter dated November 6, 1995, UGS geologist Michael D. Hylland reported on UGS's review of a 1995 engineering geology/geotechnical study of the Canyon Meadows area by AGRA Earth & Environmental, Inc. ("AGRA"). Hylland "agree[d] with AGRA's concerns regarding possible slope destabilization if care [was] not taken during future development, …." He recommended that "the existence of the landslide; the potential for future movement of the landslide; and the existence of the AGRA, UDOT, and any other pertinent engineering-geologic reports" be disclosed to potential lot owners. In a subsequent telephone conversation, Frank Ashland from UGS informed Mathis that the area "needed a general geotechnical study done to assess the capability of that landslide." (R676. at 178-79, 433, 1631, 2075.)

10. On June 24, 1996, Hylland and UGS also informed defendant and appellee Phil Wright, Director of the Wasatch City-County Health Department, that the soil upon which most of Canyon Meadows was located was "derived from the Pennsylvanian-Mississippian Manning Canyon Shale …." Hylland noted that "[a] statewide study identified the Manning Canyon Shale as a 'problem' geologic unit because of its expansive characteristics," and explained that "[e]xpansive soil and rock can be problematic for the proper functioning of STSA [(septic tank soil absorption)] systems." Quoting from a UGS

Special Study, he elaborated that "'soil-absorption systems installed in expansive soil work until the soil becomes saturated and begins to swell. The soil quickly becomes impermeable and the systems clog and fail, causing wastewater to flow to the surface creating a health hazard.'" Hylland continued, "In addition to being problematic for STSA systems, the Manning Canyon Shale is also susceptible to landsliding in part because it is expansive." Referencing the Hoover Slide, Hylland warned Wright that "[o]ld landslides can reactivate under certain circumstances, and increased ground moisture associated with STSA-system effluent can reduce the stability of slopes." Hylland recommended that "lot owners be made aware of these conditions, as well as the possibility for STSA-system failure associated with expansive soils." (R676. at 155-56, 158, 433, 1630-31, 2075.)

11. Wright in turn warned Mathis of the potential public health hazard posed by the septic systems in Canyon Meadows. (R676. at 176, 431, 1627, 2074.)

12. The Landowners agreed that the geologic unit upon which Canyon Meadows sat posed problems for the proper functioning of septic systems, and that the UGS recommendations should not be ignored. (R676. at 249, 269, 432-33, 1630, 2075.)

(c) The Landowners' Own Concerns

13. In March, 1996, the Landowners themselves were concerned about slope instability and soil conditions in the Canyon Meadows area. They made those concerns known in their opposition to the proposed New Canyon Meadows development to be located adjacent to their subdivision. (R676. at 177, 432, 1629-30, 2075.)

14. In a submission opposing New Canyon Meadows, the Landowners expressed concern about a potential "catastrophic failure of the septic drain fields on the Meadow,"

and observed that "percolation tests performed by other engineering firms have shown the majority of the lots have failed their percolation tests." They warned that over-development of the Canyon Meadows area "could have catastrophe [sic] results for the canyon meadows' homeowners by what is known as subsidence," and "may change the equilibrium soil stacking-angle and possibly abruptly trigger motion of the ancient mud flow at Canyon Meadows." The Landowners compared the Canyon Meadows area to "the Thistle Slide area in Spanish Fork Canyon" where "[t]here are numerous mud flows which have been generated ... as a result of building and improving the road there." (R676. at 432, 839-40, 877-78, 1629-30, 2075.)

15. The Landowners agreed that the Canyon Meadows area was "ecologically sensitive." (R676. at 235, 272, 432, 1629, 2075.)

16. In mid-1996, the Landowners appeared at a county commission meeting and expressed concerns regarding the effect of the New Canyon Meadows proposal on "water, septic tanks and possible land slides in the meadows." The Landowners sometimes "call[ed] Canyon Meadows the meadow." (R676. at 246, 431-32, 829, 837, 1628-29, 2074-75.)

17. The Landowners also acknowledged that several lots in Canyon Meadows did not pass percolation and other tests necessary to conclusively determine the effectiveness and safety of septic systems on those lots. For example, they noted that in 1992, 44% failed; in August, 1993, 61% failed; and in November 1993, 59% failed. (R676. at 242, 431, 1627-28, 2075.)

The County's Response

(a) WCO 97-1

18. In November, 1996, Mathis met several times, in excess of twenty hours, with the Landowners to address their concerns regarding Canyon Meadows. (R676. at 269, 430, 1627, 2075.)

19. On January 13, 1997, in response to the warnings it had received from UDOT, UGS, the Wasatch City-County Health Department, and the Landowners' own concerns, Wasatch County enacted WCO 97-1, a temporary zoning regulation, pursuant to Utah Code Annotated § 17-27-404 (1992). The county commission based the ordinance on detailed findings, including:

A. "several of the lots recently sold in the Canyon Meadows subdivision have not been able to pass percolation and other tests necessary to conclusively determine the effectiveness and safety of septic tanks on those lots";

B. "the County is unable to issue building permits for lots where it has not been conclusively establish [sic] that the septic tank plan for the building will adequately and safely handle the wastewater from the building";

C. "County officials have legitimate and serious concerns that the hydrology and geology of the area where the Canyon Meadows subdivision is located may not be suitable for additional septic tanks or the continued use of existing septic tanks";

D. "the County has legitimate and serious concerns that the aggregate concentration of wastewater in the ground may have adverse affects [sic] on the geological stability of the region";

E. "the County is aware that surrounding property owners also have plans to develop properties adjacent to the Canyon Meadows subdivision and that those plans are tentatively based on individual septic tanks for wastewater treatment, which would further compound groundwater and geological problems, if any, in the area"; and

F. "the County has determined that it is in the best interests of the County and its residents to temporarily suspend the sale of lots and the issuance of building permits in the Canyon Meadows subdivision area of Wasatch County until a comprehensive study can be done to determine the safety of the geological features of the area, and to determine the suitability of the area of [sic] continued development on individual septic tanks."

The commission thereupon found "a compelling countervailing public interest exist[ed] requiring that temporary zoning regulations be adopted to restrict the sale of lots as building lots and the issuance of building permits ...." (Aplts.' Add. at 15-17.)

20. Pursuant to WCO 97-1, the County hired Applied Geotechnical Engineering Consultants, Inc. (AGEC) to conduct a septic tank suitability study. AGEC prepared a report dated May 29, 1997. Francis Ashland, a UGS Project Geologist, reviewed the report. Ashland explained that the report "indicate[d] that the majority of the Canyon Meadows subdivision is unsuitable for septic-tank soil-absorption (STSA) systems because of shallow

ground water and steep slopes." He reported that "AGEC's results imply a potential health risk exists if STSA systems are used. ... [A] potential exists for shallow ground-water contamination and seepage of either effluent or contaminated ground water to the surface, potentially posing a health risk at homesites downslope." (R676. at 332-33, 335-37, 428-29, 1623-25, 2075.)

21. In another study performed pursuant to WCO 97-1, AGEC conducted a review of geotechnical studies and other literature related to the Canyon Meadows area. In a March, 1997, report, AGEC noted that the Canyon Meadows subdivision is located on the Hoover Slide. It reported that sliding was noted in the 1940s or earlier, and that "[c]ontinued problems with slides have occurred to the present." Based on its review, AGEC recommended additional studies "to provide a better estimate of the risk of slope failure." (R.676 at 326-29, 428, 1622-23, 2074.)

22. After conducting a subsequent preliminary slope stability investigation, AGEC reported in June that "the slope appears to be marginally stable. Due to the fact that the slope has moved, our analysis indicates that soil strengths are likely lower than what has been measured during UDOT studies and/or the slope has moved during a seismic event." AGEC recommended additional investigation "[i]n order to determine if the area is suitable for additional development, ..." (R676. at 313-24, 428, 1622-23, 2074.)

23. UGS also reviewed AGEC's preliminary slope stability report, and concluded that "AGEC's opinion that the slide is marginally stable is not overly conservative," and concurred that "additional detailed geotechnical-engineering field investigation is needed to determine whether the subdivision is suitable for additional development." (R676. at 309-

11, 428, 1622-23, 2074.)

(b) WCO 97-13

24. In light of these reports, the county commission proposed WCO 97-6, and held a public hearing to discuss the ordinance and recent findings and recommendations. An AGEC representative appeared at the hearing and reviewed its findings. AGEC reported that "the results from the study show that [Canyon Meadows] may not be suitable at this time for septic systems," and further noted that many areas in the development had "too great of a slope (over 25%), and much of the groundwater [was] too close to the surface to meet the guidelines required by the health department for safe waste disposal systems." The Landowners expressed their opposing views, and, after "lengthy discussion over the stability and suitability of the Canyon Meadows subdivision," the commission adopted WCO 97-6 pursuant to section 17-27-404 (1997). (R676. at 427-28, 821-22, 1622, 2075.)

25. The findings listed by the commission in support of WCO 97-6 included:

A. AGEC's preliminary slope stability study of the Canyon Meadows subdivision, and its recommendation that additional data be obtained to reach a final conclusion on stability;

B. UGS's review of the AGEC slope stability study and conclusion that AGEC's conclusions were not overly conservative;

C. the recommendation, based on the AGEC studies and the UGS review, of Wright and Mathis to extend WCO 97-1's moratorium on building in the Canyon Meadows area, consider a zoning change for the

area, and allow AGEC to conduct a complete slope stability study of the area; and

D. the county's determination that the slopes in and around the Canyon Meadows subdivision may not have been sufficiently stable for residential development, that further study was required, and that the risk to public health and safety was sufficiently severe to require a suspension of the sale of lots and issuance of building permits in the area.

Based on the foregoing, the county commission found a compelling countervailing public interest existed requiring a temporary zoning regulation to restrict the sale of lots for building and the issuance of building permits as set forth in the ordinance. (Aplts.' Add. at 18-20.)

26. WCO 97-6, however, never took effect. (Aplts.' Add. at 43.) When it was enacted, the county commission agreed to meet again less than a month later "to discuss any progress made with the Canyon Meadows subdivision." (R676. at 821.)

27. When the county commission reconvened, it continued its discussion of Canyon Meadows issues at a public meeting. It was reported that the Canyon Meadows Homeowners Association wanted to choose its own engineers to complete the slope stability studies. The county deputy attorney recommended that individual lot owners be issued building permits if they could "provide sufficient information proving their land is stable." "After a lengthy discussion between the Commission and the Property Owners," the commission revised WCO 97-6 to "allow for each case to be considered by the Planning, Inspecting, and Health Department for building approval." The revised ordinance was renumbered as WCO 97-13. (R676. at 426, 809, 1621-22, 2075.)

28. The text of WCO 97-13 is identical to WCO 97-6, except that paragraphs 3 and 4 of WCO 97-13 exempted lot owners from the prohibition on construction if they demonstrated that the land where their lots were located was stable. (*Compare* Aplts.' Add. 18-20 *with* Aplts.' Add. 21-23.)

29. On November 12, 1998, the county commission approved the issuance of a building permit to plaintiff/appellant Robert Perez. Several building permits were subsequently issued for the Canyon Meadows subdivision. (R676. at 163-64, 167-68, 423, 678-713, 1619-20, 2075.)

30. AGEC submitted its Stability Consultation Report in December, 1998. Although AGEC noted average movement on the slide below the development of .69 inches a year, it concluded that Canyon Meadows could be developed as intended, with precautions. AGEC also recommended that current and potential owners be informed of the anticipated movement. (R676. at 423-24, 756-94, 1620, 2075.)

31. Responding to a request from the Landowners' counsel, in mid-1999 the County's counsel informed Century Title Company that WCO 97-13 was "no longer in effect." The County's counsel made that representation based upon the knowledge that the ordinance "had expired several months earlier." (R676. at 423, 751, 753, 1619-20, 2075.)

(c) Exploring the Possibility of a Public Sewer Treatment System

32. Shortly after approving WCO 97-6, the Wasatch City-County Board of Health recommended to the Wasatch County Planning Commission that the zoning of the Canyon Meadows subdivision be amended to require a public sewer treatment system. Neither plaintiff/appellant Dee Olsen nor plaintiff/appellant Howard Vanfleet, who were in

attendance at the health board meeting where the recommendation was made, spoke against it when public comment was requested. (R676. at 430, 632, 640, 651-52, 671, 1627, 2074.)

33. The planning commission subsequently held a hearing on the recommendation. Mathis, Wright, and representatives from AGEC and UGS spoke in support of requiring a community sewer treatment system for the area. Ray Zoll, an attorney representing homeowners in the Canyon Meadows subdivision, asked the planning commission to give them six months to a year to give them time to "take care of the problem." Zoll also stated that the homeowners were "looking at a public sewer system and hope this will be the answer." A motion was made to approve an amended form of the recommendation, but it failed. (R676. at 425, 617-20, 1621, 2075.)

Resolution 99-11

34. The county commission adopted Wasatch County Resolution No. 99-11 in May, 1999. The resolution prohibited elected officials, department heads, and county employees performing major policy-making functions or participating as principal decisionmakers related to the county's legal position from communicating with adverse parties about pending litigation, unless instructed to do so by the county attorney's office. (Aplts.' Add. at 39-40.)

SUMMARY OF ARGUMENTS

The Landowners' challenge to WCO 97-1 came well beyond thirty days after its enactment, and was therefore untimely under Utah Code Annotated § 17-27-1001 (1996). Regardless, the County followed the appropriate procedure to enact the ordinance.

Furthermore, temporary zoning regulations enacted pursuant to Utah Code Annotated § 17-27-404 (1992 & 1997) do not need to be first submitted to the planning commission. Such a requirement would contradict the statute's intent to address urgent zoning issues.

The County's accommodation of the Landowners, at their behest, to allow them to build even during the restrictions imposed by a temporary zoning regulation if they could show their ground was stable should not now be manipulated into a claim that the County imposed a fee.

Under the highly deferential standard to review applied to the County's enactments of WCO 97-1 and 97-13, the Court should affirm the district court's holding that neither regulation was arbitrary, capricious, or illegal.

The district court also correctly held that WCO 97-1 and 97-13 did not effect regulatory or physical takings of the Landowners' property. The Landowners do not base their takings claim on a physical intrusion, and the district court did not evaluate their claim as such. Rather, the Landowners' claim, and the district court's evaluation, were limited to WCO 97-1 and 97-13. Whether assessed under a *Lucas* or *Penn Central* rubric, these temporary zoning regulations did not rise to violations of the Landowners' Fifth Amendment rights.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE LANDOWNERS' CHALLENGE TO WCO 97-1 WAS UNTIMELY; OR, IF TIMELY, HAT THE REGULATION WAS PROCEDURALLY VALID UNDER STATE LAW.

The district court twice held that the Landowners' challenge of WCO 97-1 as

arbitrary, capricious, or illegal was untimely because they did not make it until after the statutory thirty-day limitation period imposed by Utah Code Annotated § 17-27-1001(2) (1996)[4] had expired. (Aplees.' Add. at 2, 6, 12-13.) The Landowners do not dispute that their challenge came after the thirty-day limit, but instead argue that they should have been allowed to proceed under Utah Code Annotated § 17-27-1002 (1992)[5]. (Aplts.' Br. at 34-35.) However, the Landowners did not bring their challenge pursuant to section 17-27-1002, and therefore have not preserved this issue for appeal, nor could they.

The context of the briefing below indicates that the Landowners brought their challenge to WCO 97-1 under section 17-27-1001. (R676. at 1899-1900 (County claims challenge untimely under statute), 1959-62 (Landowners respond, but omit reference to WCO 97-1), 4084/88 (Landowners' counsel characterizes challenge to WCO 97-1 as "arbitrary, capricious and illegal").) Indeed, although they do not cite it, the Landowners lift the language of their state law challenge to WCO 97-1 and 97-13 directly from section 17-27-1001(3)(b), arguing that the ordinances were arbitrary, capricious, and illegal. (Aplts.' Br. at 31.) Moreover, the Landowners made no mention of section 17-27-1002 as the basis for their claims in their Amended Complaint. (R676. at 898-914.) Because, "as a general rule [the Court] decline[s] to address issues raised for the first time on appeal," the

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[4] This statute has since been amended and renumbered as Utah Code Annotated § 17-27a-801.

[5] This statute has since been amended and renumbered as Utah Code Annotated § 17-27a-802.

Landowners' argument should be disregarded. *Carrier v. Salt Lake County*, 2004 UT 98, ¶42, 104 P.3d 1208.

Even were the Court to consider the Landowners' argument, it would fail because their claim is more properly brought under section 17-27-1001. The Landowners charge that WCO 97-1 is illegal because it was enacted without the requisite notice, and, therefore, based in part on the reasoning of *Toone v. Weber County*[6], 2002 UT 103, 57 P.3d 1079 (a decision post-dating the orders from which the Landowners appeal), they can bring their challenge under section 17-27-1002. (Aplts.' Br. at 34-35.) In *Toone*, the Court, in *dicta*, explained that "[s]ection 17-27-1001 does not apply, however, where a party seeks relief from a county's violation of the provisions of CLUDMA [(Utah Code Annotated §§ 17-27-101 to -1003 (1996))] because a county's failure to follow the procedures mandated by CLUDMA is not a 'land use decision' made under CLUDMA." *Toone*, 2002 UT 103 at ¶9. Here, however, the procedure the Landowners claim the County violated in enacting WCO 97-1 arises from Utah Code Annotated § 52-4-6(2) of the Utah Open and Public Meetings Act (OPMA), not CLUDMA, rendering *Toone* inapposite. The Landowners' challenge of the enactment of WCO 97-1 under CLUDMA as illegal for a reason independent from CLUDMA remains subject to the thirty-day limitation of section 17-27-1001. To hold otherwise would mean any independent allegation of illegality would create a *de facto* extension of the limitation period, perhaps even years longer than the legislature intended.

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[6] The Landowners erroneously refer to this decision as *Toone v. Weber City*. (Aplts.' Br. at 34.)

(Regardless whether the Court interprets *Toone* differently, the Landowners' non-procedural challenges to the legality of WCO 97-1 under state law still would be untimely.)

Although the district court held that the Landowners' challenge to WCO 97-1 was untimely, it nevertheless went on to hold that, even if the County gave no notice of the ordinance, it did not constitute a violation of the OPMA. The district court noted that the Landowners did not raise the OPMA claim in their Amended Complaint, and held that temporary zoning regulations enacted pursuant to section 17-27-404 constituted specific exceptions to the OPMA's notice requirements when compelling, countervailing interests were at stake, as provided in section 52-4-6(4). (Aplees.' Add. at 13.) The Landowners offer no contrary interpretation.

The County finds favorable comparison to *Jablinske v. Snohomish County*, 626 P.2d 543 (Wash. Ct. App. 1981). There, Jablinske appealed from a trial court's order upholding an interim zoning ordinance prohibiting residential development that was enacted without public notice or hearing. The Washington Court of Appeals held that Washington's interim zoning statute did not require notice and a public hearing prior to adoption. After reviewing other applicable case law, the *Jablinske* court explained that "if notice and hearing requirements were applied to interim zoning decisions, developers could frustrate effective long-term planning by obtaining vested rights to develop their property," and noted that, in Washington (like Utah), "an owner's right to use his property under existing zoning vests upon the application for a building permit." *Id.* at 545 (footnote omitted).

Moreover, the Landowners actually asserted below that "Wasatch County published notice that it was going to address the issue of imposing a moratorium on Canyon Meadows

at the commission on January 13, 1997." (R676. at 513.) Indeed, the Landowners were aware of, and intended to attend, the commission meeting where WCO 97-1 was considered. The Landowners saw the proposed ordinance in the newspaper. (R676. at 251.) Accordingly, the Landowners have conceded this issue.

Because the Landowners' reference to the *Call* case, of which there are many, lacks any citation or analysis, the County does not respond thereto. (Aplts.' Br. at 34.) *See Carrier*, 2004 UT 98, ¶43 ("'It is well established that a reviewing court will not address arguments that are not adequately briefed.'" (quoting *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998))).

II. THE DISTRICT COURT PROPERLY HELD THAT WCO 97-1 AND 97-13 WERE NOT ARBITRARY, CAPRICIOUS, OR ILLEGAL.

On appeal, the Landowners challenge the legality of the County's enactments of WCO 97-1 and 97-13 because they were not first submitted to the planning commission and they imposed disclosure rules on property sales within the Canyon Meadows subdivision. (Aplts.' Br. at 35-38.) The Landowners also challenge the County's passage of WCO 97-13 because they claim it imposed a fee. (Aplts.' Br. at 33-34.)

The district court properly held that temporary zoning regulations enacted pursuant to section 17-27-404 (1992 & 1997) were not required to be first submitted to the county planning commission.[7] (Aplees.' Add. at 3.) The Landowners base their argument that such submission was required on Utah Code Annotated § 17-27-403(1)(b) (1992)'s

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[7] The Utah Legislature has since amended the temporary zoning regulation statute to make explicit that county legislative bodies may enact such regulations "without prior consideration of or recommendation from the planning commission." Utah Code Ann. §

prohibition against county commissions making "any amendment authorized by this subsection unless the amendment was proposed by the planning commission or is first submitted to the planning commission for its approval, disapproval, or recommendations." *Id.* The plain meaning of this language limits its application to "amendment[s] authorized by this subsection." *See, e.g., Li v. Enterprise Rent-A-Car Co. of Utah*, 2006 UT 80, ¶9 (describing a "familiar canon[ ] of statutory construction" as "'first looking to the statute's plain language'" (quoting *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, ¶21, 63 P.3d 705)). Consequently, the requirement to submit proposed ordinances to the planning commission applied only to amendments affecting "the number, shape, boundaries, or area" of zoning districts, "regulation[s] of or within zoning district[s]," or "other provision[s] of the zoning ordinance." Utah Code Ann. § 17-27-403(1)(a)(i)-(iii) (1992). It does not, by the very principle relied upon by the Landowners (*expressio unius est exclusio alterius* (Aplts.' Br. at 37)), include temporary zoning regulations enacted pursuant to section 17-27-404.

Indeed, reading sections 17-27-403 and 17-27-404 as the Landowners do violates another canon of statutory construction: "In conducting this plain meaning analysis, '[w]e read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.'" *Li*, 2006 UT 80, ¶9 (quoting *Miller v. Weaver*, 2003 UT 12, ¶17, 66 P.3d 592) (footnote omitted). Section 17-27-403(2) required the legislative body to comply with the procedure specified in Utah Code Annotated § 17-27-402 "in preparing and adopting an amendment to the zoning

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17-27a-504(1)(a) (2005).

ordinance ...." *Id.* Section 17-27-402, in turn, required county legislative bodies to hold a public hearing before deciding whether to approve a zoning ordinance or amendment. *See* Utah Code Ann. § 17-27-402(2)-(3) (1992). Thus, interpreting section 17-27-403 as including temporary zoning regulations with its ambit runs afoul section 17-27-404(1)(a)'s provision that such regulations may be enacted "without a public hearing." Utah Code Ann. § 17-27-404(1)(a) (1992 & 1997). As the district court noted, requiring the presentation of such an ordinance to the planning commission contradicts the apparent urgency contemplated by the statute's exception of such enactments from the standard public hearing requirement. (Aplts.' Add. at 45.)

The Landowners provide no citation to the record showing that they preserved the issue of whether WCO 97-1 and 97-13's disclosure requirements were illegal. Nor was their briefing of this argument adequate. They cite to a nonexistent statute and offer scant analysis. (Aplts.' Br. at 37-38.) *See State v. Jaeger*, 1999 UT 1, ¶31, 973 P.2d 404 (explaining that Utah Rule of Appellate Procedure 24(a)(9) "'requires not just bald citation to authority, but development of that authority and reasoned analysis based on that authority'" (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)).

The County presumes the Landowners' argument on this point refers to paragraphs 3 and 5 of WCO 97-1 and 97-13, respectively. These provisions prohibited the Landowners from representing that septic tanks or building would be allowed, and required them instead to disclose the existence of the temporary zoning regulations when selling lots within Canyon Meadows. (Aplts.' Add. at 16 & 23.) Nothing in section 17-27-404 prohibited the County from exercising its police power to ensure that

unsuspecting buyers were made aware of the public health and safety issues in the development. *See, e.g., Peck v. Dunn*, 574 P.2d 367, 368 (Utah 1978) ("It is elementary that the governing authority in the exercise of its police power has both the prerogative and the responsibility of enacting laws which will promote and conserve the health, safety, morals and general welfare of society." (footnote omitted)). Moreover, far from exceeding the authority granted by section 17-27-404, these disclosure requirements actually furthered its statutory intent by informing new owners of the regulation, thereby avoiding inadvertent construction, reconstruction, or alterations prohibited under the temporary regulation.

Finally, the district court correctly held that WCO 97-13's exception allowing the Landowners to obtain building permits upon completing "a slope stability study establishing that the property is sufficiently stable for residential building under accepted safety and building principles" (Aplts.' Add. at 23) did not "constitute a fee and [was] not contrary to Utah law" (Aplees.' Add. at 3). The Landowners themselves requested they be allowed to use their own engineers to complete the slope stability study, and this language was inserted as an accommodation, not as an impact fee or other financial requirement in violation of section 17-27-404(c). (Aplees.' Stmt. of Facts ¶27.) Again, relying on the rule of statutory construction requiring the Court to look first to the statute's plain language, the mere availability of a method to avoid the restriction imposed by a temporary zoning regulation does not equate to either a fee or a financial requirement.

Under the "highly deferential" standard of review applied to the County's

enactment of WCO 97-1 and 97-13 applicable here, *Bradley v. Payson City Corp.*, 2003 UT 16, ¶¶14 & 24, 70 P.3d 27 (endorsing the "reasonably debatable" standard for reviewing legislative land use decisions), and the presumption that the regulation is valid, *see* Utah Code Ann. § 17-27-1001 (1996), the Court should affirm the district court's holding that neither regulation was arbitrary, capricious, or illegal.

III. THE DISTRICT COURT CORRECTLY HELD THAT WCO 97-1 AND 97-13 DID NOT EFFECT REGULATORY OR PHYSICAL TAKINGS OF THE LANDOWNERS' PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT.

Because the Landowners brought only federal takings claims (Aplees.' Add. at 76-77), and have not yet pursued a takings claim to its conclusion under state law, the Court lacks subject matter jurisdiction over these unripe claims. The County has filed a motion for summary disposition contemporaneously herewith on these grounds. Nevertheless, out of an abundance of caution, the County responds to this argument as follows.

The Landowners assert the district court ruled that, "as a matter of law, 'a land use regulation that is by its terms temporary, meaning finite in duration, is not a taking,'" and then argue that this holding was "expressly overturned" in the Supreme Court's subsequent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), which, they state, requires a detailed and complex factual inquiry antithetical to summary judgment (Aplees.' Br. at 26-29, 44-51.) The Landowners misinterpret both the district court's order and the *Tahoe-Sierra* decision, and continue to misapprehend controlling takings jurisprudence.

In *Tahoe-Sierra*, the Supreme Court affirmed the Ninth Circuit's refusal to

recognize, under a "conceptual severance" theory, that temporary deprivations of use of property constitute "the 'extraordinary case' in which a regulation permanently deprives the property of all value." *Tahoe-Sierra*, 535 U.S. 332. Such total takings, the Court explained, should be analyzed under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *See Tahoe-Sierra*, 535 U.S. at 330. "Anything less than a 'complete elimination of value,' or a 'total loss' require[s] the kind of analysis applied in *Penn Central* [*Transportation Co. v. City of New York*, 438 U.S. 104 (1978)]." *Id.* (quoting *Lucas*, 505 U.S. at 1019-20 n.8). Hence, "[t]he starting point for [a] court's analysis should [be] to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* [is] the proper framework." *Id.* at 331.

Throughout the course of this litigation, however, the Landowners, like the plaintiffs in *Tahoe-Sierra*, have insisted that the temporary regulations at issue effected a total loss of the use of their property, requiring a *Lucas* analysis. (R676. at 469-71, 474-75, 1609-17, 1950-54, 1957-59, 2211-15, 2345-47, 2351-56.) Like the Supreme Court in *Tahoe-Sierra*, the district court rejected the Landowners' "conceptual severance" argument. In that context, it stated:

> Plaintiffs argue that during that finite time period, there were no economically beneficial uses available to them which effected the total taking of their property for which they must be compensated. The Court disagrees. The Court finds as a matter of law that a land-use regulation that is by its terms temporary, meaning finite in duration, is not a taking.

(Aplts.' Add. at 8.) The Landowners attempt to paint this statement as more than it is by avoiding any reference to the court's later acknowledgement that "[o]f course it is possible to conceive of a regulation that purports to be temporary, but in fact is not so. Obviously, a

regulation merely masquerading as a temporary regulation could enact a taking. However, the Court need not consider this situation at this time." (Aplts.' Add. at 9.) Thus, the appropriate interpretation of the trial court's decision, given this context, is that, by rejecting "conceptual severance," the only theory the Landowners propounded, the court also rejected the notion that a temporary zoning regulation constitutes a total taking of the type governed by *Lucas*. In fact, the trial court's order, to which the Landowners did not object, merged these statements: "[A] land-use regulation that is, by its terms and application, temporary, meaning finite in duration, it [sic] is not a taking." (Aplees.' Add. at 13 (emphasis added).)

Because the Landowners have never allowed, even as an alternative theory, that the temporary regulations effected a partial taking, the district court did not need to analyze their claims under *Penn Central*. (The Landowners' argument that they experienced a complete taking for a finite period of time, thus requiring a fact-intensive analysis mistakenly blurred the distinction between complete and partial takings. Either the taking was complete or it was partial; if complete, the *Lucas* analysis applied; if it was partial, the *Penn Central* analysis applied. *See Tahoe-Sierra*, 535 U.S. 330. The Landowners cannot now use that blurred distinction to overcome the directly-on-point *Tahoe-Sierra* decision that rejected the precise view they asserted below.) Regardless whether it needed to do so, the trial court did make *Penn Central* findings in support of its determination.

In *Penn Central*, while the Court rejected a specific formula for determining whether a compensable regulatory taking has occurred, it did note two broad categories of inquiry: (1) the "economic impact of the regulation," including "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (2) "the character of the

governmental action." *Penn Central*, 438 U.S. at 124. With regard to the latter, the Court noted that, where courts "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by" the land-use regulation, it had upheld those decisions. *Id.* at 125. The Court also relied on *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), where a land-use restriction was upheld because it was implicitly reasonably necessary to effect a substantial public purpose. *See Penn Central*, 438 U.S. at 126-27; *Goldblatt*, 369 U.S. at 594-96. In *Penn Central*, the Court determined a partial taking had not occurred because the ordinances in question "substantially related to the promotion of the general welfare," and permitted "reasonable beneficial use" of the property. *Penn Central*, 438 U.S. at 138. These guideposts, as Justice O'Connor described them in her *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), concurrence, are *ad hoc* determinations. *See id.* at 632-36 (O'Connor, J., concurring). However, nothing prevents a court from making a summary judgment determination upon undisputed facts, the Landowners' protestations and reliance on *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1998), notwithstanding.

While the Landowners argue about the findings of various studies or their scope, it is undisputed that at the time WCO 97-1 and 97-13 were enacted the stability of the slope in the Canyon Meadows area and its suitability for septic systems were in question. (Stmt. of Facts ¶¶5-31.) The Landowners' suggestion that Judge Taylor's finding that "some or all of the development is located in an area with a long history of instability and land slippage, and that the County had justified concern regarding slope stability and the suitability of the area for building, especially for the safety of septic systems" (Aplees.' Add. at 2) arose from a personal bias (Aplts.' Br. at 23) illustrates this point. The conversation quoted by the

Landowners was preceded by the Landowners' counsel's concession that "[i]t is a sensitive area." Moreover, the Landowners' counsel agreed with the judge's observation that the area "has always been known historically, generally known to have slides." (R676. at 4084/78.)[8]

Therefore, insofar as the Landowners claim that WCO 97-1 and 97-13 worked a complete taking for a finite period of time, the district court properly dismissed their claim under the *Tahoe-Sierra* analysis. Insofar as they claim a partial taking, the district court correctly held that the temporary regulations were substantially related to the public health, safety, and general welfare under the *Penn Central* rubric.

While the Landowners briefly argued below that the County's or its agent's installation of slope movement monitors constituted a physical taking (R676. at 1607-09), the takings claim alleged in the Landowners' Amended Complaint was purely regulatory (Aplees.' Add. at 76-77), and the district court's order reflected nothing more. The court held that the temporary regulations "did not effect a physical taking." (Aplees.' Add. at 3.) The court did not address the physical invasion of the Landowners' property except to address their trespass claim, which is not presented on appeal. (Aplees.' Add. at 7-8.) Should the Court determine that the physical takings claim is properly before it, the Landowners' counsel conceded no taking had occurred at oral argument on the first motion for summary judgment. The district court asked whether the Landowners were "complaining that the wells are keeping them from using the property in some way or

[8] To the extent the Landowners suggest bias, their counsel's concurrence militates against such a finding. At the very least, the alleged error was invited and any objection waived.

otherwise taking away the use of the property," to which the Landowners' counsel responded, "I don't believe at this point we've had a problem, Your Honor. I can't say that we have." (R676. at 4084/113.)

IV. THE COUNTY'S ENACTMENT OF WCO 97-1 AND 97-13 DID NOT VIOLATE THE LANDOWNERS' FEDERAL SUBSTANTIVE DUE PROCESS OR EQUAL PROTECTION RIGHTS.

The district court dismissed the Landowners' federal substantive due process and equal protection claims upon finding a rational basis for WCO 97-1 and 97-13. (Aplees.' Add. at 5-6.) On appeal, the Landowners attempt to overcome the lower court's holding by relying on a Wyoming decision and creating a list of bulleted allegations they contend create issues of fact as to whether the County was motivated by malice or bad faith. (Aplts.' Br. at 52-55.) That, however, is not the standard for assessing federal substantive due process and equal protection claims, and it provides no basis for disregarding the district court's holding.

When considering a federal equal protection claim, "[w]here no suspect classification or violation of a fundamental right is involved, a difference in treatment 'need only be rationally related to a valid public purpose' to withstand equal protection scrutiny." *State v. Holm*, 2006 UT 31, ¶99, 137 P.3d 726 (quoting *State v. Lafferty*, 2001 UT 19, ¶71, 20 P.3d 342). Since there is no fundamental right or suspect classification at issue in this case, the regulations must be examined under the rational basis test. "Under rational basis review, 'a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" *Schutz v. Thorne*, 415 F.3d 1128, 1136 (10th Cir. 2005) (quoting *FCC v. Beach Commc'ns*, 508

U.S. 307, 315 (1993)) (citation omitted). "Moreover, 'those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.'" *Id.* (quoting *Beach*, 508 U.S. at 315) (citation omitted). "Under this standard, 'statutory classifications will be set aside only if no grounds can be conceived to justify them.'" *Id.* (quoting *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004)) (citation omitted). "Nor should courts in reviewing challenged classifications '(1) second guess the wisdom, fairness, or logic of legislative choices; (2) insist on razor-sharp legislative classifications; or (3) inquire into legislative motivations.'" *Id.* (quoting *Powers*, 379 F.3d at 1225 (citations omitted)). Under these circumstances, the test employed for substantive due process is the same. *See Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) (applying rational-basis review to both questions).

WCO 97-1 and 97-13 were founded on the County's rational and well-supported concern regarding the slope stability, soil suitability, and groundwater levels in and around Canyon Meadows. (Stmt. of Facts ¶¶5-28.) Under the highly deferential standard described above, these legislative acts are therefore rationally based, and thereby withstand the Landowners' challenge under the Equal Protection and Due Process Clauses.

V. THE DISTRICT COURT PROPERLY HELD THAT WCR 99-11 DOES NOT INFRINGE ON THE LANDOWNERS' FIRST AMENDMENT RIGHTS.

WCR 99-11 does nothing more than express Utah Rule of Professional Conduct 4.2(d) by resolution. The resolution is limited in its application to communication involving pending litigation between parties suing the county and the members of the

county's control group. It requires elected officials, department heads, or employees that perform major policy-making functions or who participate as principal decisionmakers regarding the county's legal position to refer inquiries from adverse parties regarding the subject matter of the pending litigation to the county attorney's office. (Aplts.' Add. at 39.) This does not violate the First Amendment any more than does the rule of professional conduct. It does not foreclose the right to petition for redress, nor does it inhibit speech.

Moreover, the right to petition for redress does not "imply a duty of the government to make every government employee a petition receiver .... [W]e think it plain that the right is merely a right to petition the appropriate government entity ...." *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000). Insofar as the Landowners challenge the resolution as applied, they identify no instance when it has been applied to them. Nor do they make any showing that would satisfy the public concern test. *See Martin v. City of Dell*, 179 F.3d 882, 889 (10th Cir. 1999) (requiring that right to petition claims meet the "public concern" test).

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), relied on by the Landowners, is inapposite to this analysis. *California Motor* was an antitrust case brought between trucking companies alleging improper attempts to influence the government against a competitor. It had nothing to do with communications between government control group members and adverse litigant-citizens regarding the subject matter of the litigation. Similarly, *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), also cited by the Landowners, offers little insight.

The case involved the commercial speech of pharmacists seeking to advertise prices for prescription drugs, not the ability of adverse litigants to speak with the governmental entity's control group members.

VI. THE DISTRICT COURT PROPERLY HELD THAT THE LANDOWNERS' CHALLENGE TO WRIGHT'S ENFORCEMENT OF PERCOLATION TESTS AT A CERTAIN DEPTH WAS BARRED BY *RES JUDICATA*.

Although the Landowners reference publication issues related to septic policies they attach in their addendum as a basis for appeal (Aplts.' Br. at 38-39), those issues were not alleged as a basis for the claims asserted in this action (Aplees.' Add. At 73-87) and were not decided by the district court. The lower court did consider the four-foot ten-inch percolation testing depth issue in the context of the Landowners' section 1983 claim against Wright. In that context, the district court held that the issue was barred by *res judicata*. (Aplees.' Add. at 15.) Accordingly, the County's response to the Landowners' argument on appeal is similarly limited.

The testing depth issue, as well as the other health department policy issues treated by the Landowners in their brief, were raised in a separate suit filed in the Utah Fourth District Court, case number 990500239, that was never consolidated into this action. (R676. at 2390-2401, 2412.) The parties stipulated to dismiss that suit with prejudice. (R676. at 2404-08, 2412.) (A copy of the order is attached to the Appellees' Addendum at 91-92.) The Landowners' challenge of the court's holding that the issue was barred by *res judicata* by arguing that it was not a final determination on the merits (Aplts.' Br. at 39-41) must therefore fail. *See Ringwood v. Foreign Auto Works*, 786 P.2d 1350, 1358

n.5 (Utah Ct. App. 1990) ("The fact that the prior action was dismissed with prejudice does not nullify res judicata application, as such constitutes litigation on the merits."). *See also* E.H. Schopflocher, Annotation, *Provision that Judgment Is "Without Prejudice" or "With Prejudice" as Affecting Its Operation as Res Judicata*, 149 A.L.R. 553 (1944) ("As a general proposition, a judgment of dismissal which expressly provides that it is "with prejudice" operates as res judicata.").

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED THE COUNTY'S MOTION TO COMPEL THE LANDOWNERS' ANSWERS TO INTERROGATORIES REQUESTING THEY IDENTIFY THE BASES FOR THEIR CLAIMS.

The County suggests the Landowners' briefing on this issue is inadequate. (Aplts.' Br. at 58-59.) *See Jaeger*, 1999 UT 1, ¶31 (explaining that Utah Rule of Appellate Procedure 24(a)(9) "'requires not just bald citation to authority, but development of that authority and reasoned analysis based on that authority'" (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)). Nevertheless, the County responds as follows.

The district ordered the Landowners to answer interrogatories identifying the clearly established law they contended Mathis and Wright violated and the percolation test standards they contended Wright should have applied to their properties rather than those he allegedly did apply. (Aplees.' Add. at 17-19.) The Landowners' arguments that these requests improperly sought legal conclusions and lay opinion are unavailing. (Aplts.' Br. at 58-59.) Since the 1970 amendment of Federal Rule of Civil Procedure 33(c), which Utah subsequently adopted, "there is no longer any axiomatic rule that an interrogatory must be disallowed merely because it calls for an opinion or contention."

8A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2167 (2d ed. 2004).[9] In fact, now "the only kind of interrogatory that is objectionable without more as a legal conclusion is one that extends to 'legal issues unrelated to the facts of the case.'" 8A *Federal Practice and Procedure* § 2167 (quoting Fed. R. Civ. P. 33(b), 1970 advisory committee note). Because the County's interrogatories directly related to the facts of the Landowners' remaining claims, the district court properly ordered the Landowners to respond. *See, e.g., Coles v. Jenkins*, 179 F.R.D. 179, 180-81 (W.D. Va. 1998) (upholding an interrogatory asking defendant to identify a standard of care).

The Landowners' argument that these interrogatories were improperly directed to lay witnesses not only fails to acknowledge that the Landowners should have some idea of the law they claimed the County violated, but also the reality that "[a]ssistance of counsel is clearly contemplated by the Federal Rules of Civil Procedure." *Exxon Corp. v. FTC*, 384 F. Supp. 755, 758 n.3 (D.D.C. 1974). *See also* 8A Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 2172 (2d ed. 2004) ("[U]ndoubtedly the common practice is for the attorney to prepare the answers and have the party swear to them.").

Even if the interrogatories were improper, the Landowners fail to show the court's order requiring them to respond resulted in prejudice. *See, e.g., Price v. Armour*, 949 P.2d 1251, 1255 (Utah 1997) ("If the error was harmless, that is, if the error was sufficiently inconsequential that there is no reasonable likelihood that it affected the

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[9] "Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are 'substantially similar' to the federal rules." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶7 n.2, 53 P.3d 947 (quoting *Lund v. Brown*, 2000 UT 75, ¶26, 11 P.3d 277).

outcome of the case, then a reversal is not in order.").

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE COUNTY'S MOTION TO LIMIT THE PLAINTIFFS IN THE SUIT TO THOSE NAMED IN THE LANDOWNERS' AMENDED COMPLAINT.

Upon the County's March, 2005, motion, the district court issued an order limiting the suit to those plaintiffs named in its 1999 Amended Complaint. (Aplees.' Add. at 20-21.) The Landowners' Amended Complaint had listed sixty-nine or seventy-two John Doe plaintiffs (the numbers differed from the caption and text of the Amended Complaint) (Aplees.' Add. at 52-53), yet the Landowners had never attempted to identify the John Does. After obtaining an order compelling the Landowners to serve and file executed verifications of their interrogatory answers (Aplees.' Add. at 17-19), the Landowners began submitting verifications from individuals that were not identified as plaintiffs in the case (R676. at 2656-63, 2688). The district court appropriately prohibited the Landowners from effectively amending their complaint via such verifications, and properly found that, absent an order allowing them to amend their Amended Complaint, their identification of John Doe plaintiffs was improper.

Utah Rule of Civil Procedure ("Rule") 10(a)'s requirement that the complaint "include the names of all the parties" and Rule 17(a)'s direction that "[e]very action shall be prosecuted in the name of the real party in interest," taken together, preclude plaintiffs from proceeding as unnamed parties except in limited circumstances inapplicable here. *See, e.g.*, Francis M. Dougherty, *Propriety and Effect of Use of Fictitious Name of Plaintiff in Federal Court*, 97 A.L.R. 369 § 2[a] (observing that federal rules make no

provisions for anonymous plaintiffs, that Rule 10(a) appears to prohibit it, but that it has been allowed "in certain circumstances").[10]

The Tenth Circuit has explained that "[t]his use of pseudonyms concealing plaintiffs' real names has no explicit sanction in the federal rules. Indeed it seems contrary to Fed. R. Civ. P. 10(a) which requires the names of all parties to appear in the complaint." *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir. 1979). The court further declared that "identifying a plaintiff only by a pseudonym is an unusual procedure, to be allowed only where there is an important privacy interest to be recognized." *Id. See also Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992) ("The ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the 'customary and constitutionally-imbedded presumption of openness in judicial proceedings.' It is the exceptional case in which a plaintiff may proceed under a fictitious name." (quoting *Doe v. Stegall*, 650 F.2d 180 (5th Cir. 1981))). No such interest has been identified here, and the district court properly limited the suit to the named plaintiffs.

The *Intermountain Physical Medicine Assocs. v. Micro-Dex Corp.*, 739 P.2d 1131 (Utah Ct. App. 1987), decision upon which the Landowners rely (Aplts.' Br. at 60) does not support the Landowners' assertion that their failure to identify plaintiffs in this action was acceptable under the Rules. There, the trial court denied the partnership plaintiff's motion to amend its complaint to add three professional corporations that were members

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[10] *See supra*, footnote 9.

of the partnership and found to be indispensable parties. *See Intermountain Physical*, 739 P.2d at 1132. The court of appeals held that the denial was error, and that the plaintiff should have been allowed to amend under a combined reading of Rules 17 and 19. *See id.* at 1132-33. Here, in contrast, the Landowners did not demonstrate that the other lot owners, the alleged John Does, were either real parties in interest or indispensable. Nor did the Landowners make any attempt to amend their complaint to identify the John Does in the nearly six-year span between their Amended Complaint and the County's motion. Moreover, even if Rule 17 could be read to allow the Landowners not only to list unnamed plaintiffs, but also to wait to identify them so long after they filed their Amended Complaint, it would not relieve them of Rule 10(a)'s duty to identify known plaintiffs in their complaint because "[e]very pleading shall state the name and address of the party for whom it is filed …."

Even supposing the John Doe plaintiffs could have proceeded anonymously for reasons of judicial economy, actual knowledge, or a lack of prejudice (Aplts.' Br. at 59-61), the Landowners present no evidence that any of those three rationales applied here. Constitutional violations usually attach to people, rather than property. Assuming, however, that the Landowners indeed would have had to amend their complaint each time a new conveyance occurred, it would have been their burden to do so, and one of the annoyances of representing multiple parties. That the Landowners would have had a heavier load administering their suit does not outweigh the constitutional presumption of judicial openness recognized in *Frank*. The Landowners had several mechanisms available to them under the Rules that would have allowed them to address their

expressed concerns about judicial economy. For example, they could have petitioned to certify a class. They did not do so, and they cannot now rely on that failure to excuse them from their obligation to identify the John Doe plaintiffs.

The facts the Landowners proffer do not support their argument that the County had actual knowledge of the John Doe plaintiffs' identities. The Landowners' assertion that the John Doe plaintiffs were identified in a December 9, 1998, discovery response to County interrogatories (Aplts.' Br. at 60; Aplts.' Add. at 56-61) is misleading. The Landowners have failed to disclose to the Court that those interrogatory answers do not pertain to this suit, but rather a separate suit that was litigated in federal court. (R676. at 4086/11-/14 (conceding the answers were made in the context of a separate federal action).) The only depositions actually referenced by the Landowners that can be associated with a suit (*i.e.*, display cover pages) also occurred under the same separate federal suit. (R676. at 2744-56.)[11]

Finally, the Landowners' dismissive treatment of the increased liability identifying seventy-two additional plaintiffs would have presented to the County ignores its true weight. (Aplts.' Br. at 61.) Not only would the County's potential liability increase several fold, but the addition at such a late stage in the litigation could not have avoided imposing significant delay and cost associated with the additional discovery that would have had to have been undertaken.

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[11] If the Landowners really did know the identity of the John Doe plaintiffs at the time they listed them as unknown in their 1999 Amended Complaint in this case, it likely would be sanctionable.

IX. THE LANDOWNERS WAIVED THEIR CLAIMS FOR ZONING ESTOPPEL, FOR WCO 97-13 LASTING LONGER THAN SIX MONTHS, AND FOR ALLEGED VIOLATIONS OF THEIR FEDERAL CONSTITUTIONAL RIGHTS COMMITTED BY WRIGHT AND MATHIS.

After the district court decided the parties' cross-motions to reconsider, the only issues remaining in the case were: (1) whether the County was estopped from refusing to issue building permits based on alleged representations made by Mathis and Wright; (2) whether the County enforced WCO 97-13 longer than six months; (3) whether Mathis enforced WCO 97-1 and 97-13 longer than six months each in violation of the Landowners' federal constitutional rights, entitling them to punitive damages; and (4) whether Wright's alleged requirement that the Landowners perform percolation tests of "a certain age and quality" violated their federal constitutional rights and entitled them to punitive damages. (Aplees.' Add. At 15-16.)

The County moved for summary judgment on these remaining claims, which was vigorously opposed by the Landowners. Without any forewarning, however, at the scheduled hearing on the County's motion the Landowners' counsel asked the court to grant the County's motion against his clients. (Aplees.' Add. at 25 ("I'm standing before the court saying that I believe it's in the best interest of this court and all the parties that the court rule against my client [sic] on this apparent motion for summary judgment.") Describing their remaining claims as "tagalongs," the Landowners' counsel explained that it was "appropriate for the court to find as a matter of law that there's insufficient evidence on the remaining issues … there is insufficient evidence to prove that we can go forward on the remaining issues." (Aplees.' Add. at 26-27.)

Accordingly, the Landowners waived their arguments against summary judgment on those remaining claims, and are estopped from contesting them here. *See Trees v. Lewis*, 738 P.2d 612, 613 (Utah 1987) ("As a general rule, ... one who acquiesces in a judgment cannot later attack it." (footnote omitted)). Although the Landowners claimed the district court's prior summary judgment rulings precluded them from presenting evidence that would have allowed them to prevail on their remaining claims (Aplees.' Add. at 31-33), they did not explain how the prior rulings created that effect and fail to address that issue now on appeal. Without presenting the additional facts that they represented below would have allowed them to prevail, the Landowners cannot claim error in district court's grant of their invitation for summary judgment. *See Butler, Crockett, and Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 235-36 (Utah 1995) ("'A party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error ....'" (quoting *Ludlow v. Colorado Animal By-Products Co.*, 137 P.2d 347, 354 (Utah 1943))).

Even if the Landowners had not waived their remaining claims or invited the court's allegedly erroneous judgment thereon, those claims still would fail, as the district court stated, "for the reasons and based upon the facts presented by and the arguments asserted in defendants' supporting and reply memoranda." (Aplees.' Add. at 36.)

The Landowners' argument that WCO 97-1 and 97-13 were enforced longer than

six months, creating "a series of rolling moratoria"[12] (Aplts.' Br. at 32) is entirely unsupported. The Landowners presented no admissible evidence that any of them were refused or denied an application for a building permit because of either regulation later than six months after its enactment. (R676. at 3130-31, 3575-76.) Nor do they even address in their brief the district court's holdings that their claim was moot and that they had failed to exhaust their administrative remedies. (R676. at 3132-33, 3577-78.)

Regarding their zoning estoppel claim, the Landowners appear to ignore altogether that the claim was decided against them on the County's second motion for summary judgment, instead citing to their proposed second amended complaint (Aplts.' Br. at 5) and the district court's memorandum decision on the parties' cross-motions for summary judgment (Aplts.' Br. at 55). Nowhere have the Landowners adequately briefed why they would fall within an exception to the general rule against applying estoppel to a governmental entity. (R676. at 3131-32, 3577.) *See Jaeger*, 1999 UT 1 at ¶31, ("We have made clear that this court is not 'a depository in which the appealing party may dump the burden of argument and research.'" (quoting *State v. Bishop*, 753 P.2d 439, 450 (Utah 1988)) (citation omitted)).

Finally, the Landowners' challenge to the court's grant of qualified immunity to Mathis and Wright (Aplts.' Br. at 56-58) (the County assumes the Landowners do not challenge the absolute immunity found in response to the parties' cross-motions for summary judgment and reconsideration (Aplees.' Add. at 3, 13)) does not even begin to

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[12] The Landowners use quotation marks for this phrase, but do not indicate what they are quoting. (Aplts.' Br. at 32.)

address the lack of a protectible property interest, rational basis, shocks the conscience, timeliness, dissimilarly situated, and linkage arguments raised in the County's memoranda supporting its second motion for summary judgment. (R676. at 3134-54, 3579-98.)

X. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE COUNTY ITS ATTORNEY FEES IN DEFENDING AGAINST CLAIMS ULTIMATELY ABANDONED BY THE LANDOWNERS AS UNWINNABLE.

The County first notes that the $74,319.71 referenced by the Landowners constitutes an award of all legal expenses incurred by the County in defending against the Landowners' remaining claims from July 26, 2002, through the date they abandoned them. (Aplees.' Add. At 38-40.) Since the Landowners dispute only the award of fees, $3,041.43 of that amount awarded as incurred costs (R676. at 3848-49, 3955-56) remains undisputed.

It is well-settled that prevailing defendants should be awarded their fees pursuant to 42 U.S.C. § 1988 for defending against 42 U.S.C. § 1983 claims that plaintiffs continue to litigate after they clearly become groundless. *See Prochaska v. Marcoux*, 632 F.2d 848, 854 (10th Cir. 1980) (holding that prevailing defendants should be awarded fees if "'a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'" (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978))).

At the hearing before Judge Schofield on the County's second motion for summary judgment, the Landowners' counsel stated that "the facts that are necessary to prove our

case on these remaining issues have been precluded by the previous motions for his [sic] summary judgment." Counsel continued, stating that it was "appropriate for the court to find as a matter of law that there's insufficient evidence on the remaining issues ... there is insufficient evidence to prove that we can go forward on the remaining issues." Counsel stated that it was his "professional opinion at this point that we're not going to be able to cross the high hurdles because the facts that we need to present to the court have been precluded by previous rulings by the Fourth District Court." He explained that "[t]he evidence isn't there now because it's all been precluded by previous motions. With what we have at this point I don't believe we can support the high thresholds." (Aplees.' Add. at 26-27, 31-33.) Similarly, in their memorandum opposing the County's motion for fees, the Landowners reaffirmed their position that the district court's decisions on the parties' cross-motions for summary judgment and cross-motions for reconsideration (issued in June, 2001, and March, 2002, respectively) prevented them from "presenting sufficient evidence prove [sic] the remaining claims." (R676. at 3939.)

In other words, the Landowners conceded that, with the district court's June, 2001, and March, 2002, decisions, they lacked grounds upon which to continue asserting their remaining claims. By the Landowners' own admission, then, their July 26, 2002, responses to the County's narrow written discovery requests should have distilled the absence of facts necessary to meet the burdens of proof associated with their remaining claims. (R676. at 2536-46.) Yet, instead of acknowledging their inability to present sufficient facts to succeed on their claims when it became clear they lacked sufficient grounds (thereby saving the parties and the district court the dedication of significant

resources), the Landowners continued to fiercely litigate the case for over three more years. During that time, they forced procedural motions and opposed the County's second motion for summary judgment. The Landowners' conduct therefore subjected them to an award of fees under section 1988.

The Landowners present no evidence that the district court's finding that the County had prevailed on all claims was anything more than a necessary observation to properly designate it as the prevailing party. Instead, the findings upon which the district court based its opinion were that the Landowners knew or should have known as of July 26, 2002, "that they had insufficient factual grounds" to support their remaining claims, that they "nonetheless continued to vigorously litigate these claims unnecessarily," and that they "ultimately conceded they had insufficient grounds for their remaining claims, but not until the moment of oral argument on defendants' motion for summary judgment." (Aplees.' Add. at 38-40.)

The Landowners also argue that the award of fees was an abuse of discretion because they did not litigate their remaining claims in bad faith, and, in fact, were attempting to conserve judicial resources. (Aplts.' Br. at 64-66.) Yet, a showing of bad faith is not required, nor is a finding of good faith sufficient to avoid an award. *See Anthony v. Baker*, 767 F.2d 657, 667 (10th Cir. 1985) ("Good faith is not a special circumstance justifying the denial of attorneys' fees under § 1988. ... A prevailing defendant in a § 1983 action need not establish that a plaintiff proceeded in bad faith prior to recovering attorneys' fees; ....").

This Court cannot grant the Landowners' request for section 1983 fees on appeal

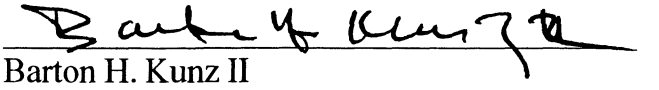
(Aplts.' Br. at 66) unless it holds that the district court not only erroneously granted the County's motion for summary judgment on a section 1983 claim, but also erred in not granting the Landowners' motion on such a claim. Conversely, an affirmation entitles the County to its fees under the same reasoning.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's orders.

DATED this 22nd day of December, 2006.

CHRISTENSEN & JENSEN, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2006, two true and correct copies of the foregoing **BRIEF OF THE APPELLEES** were sent via postage prepaid, first class U.S. mail to:

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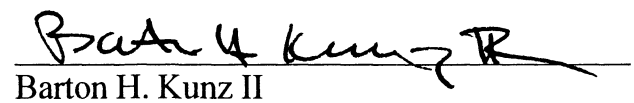

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